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SUPREME COURT, U.S.

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No. 99-634

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1999

BOBBIE J. ANDERSON
Petitioner

v.

DALLAS AREA RAPID TRANSIT,
Defendant-Respondent

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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The undersigned counsel of record certifies that the following lawyers and law firms have been involved in the case, and that the following persons have an interest in the outcome of the case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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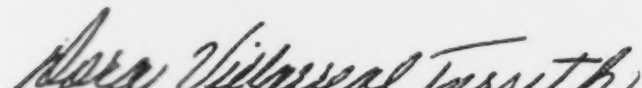

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STATEMENT OF THE CASE

Bobbie J. Anderson ("Anderson") has not accurately stated the facts in this case.[1]

This case arises out of a civil suit filed by Anderson against Dallas Area Rapid Transit ("DART") on July 28, 1997. The suit alleged racial discrimination and retaliation under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., constitutional violations under 42 U.S.C. §§ 1981, 1983, 1985, and claims under Texas common law.

Anderson, an African-American, alleged that his termination on April 3, 1997 was based on his race and in retaliation for his prior complaint to DART's Chief of Transit Police, Juan Rodriguez ("Rodriguez") that Black DART employees were disciplined more harshly than Hispanic DART employees.

Anderson was hired as a DART Transit Police Officer and started his employment with DART on May 28, 1996. As a standard condition of employment, Anderson was placed on an initial six month probationary period. Anderson failed to satisfactorily complete his probation period and was terminated in September of 1996. However, the termination

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[1] The court found that all the background facts that lead to Anderson's termination were undisputed except for two. One such fact was immaterial to the court's decision and with respect to the other, the court found that both Anderson and DART agreed that at one point Anderson did draw his weapon. Furthermore, Anderson admits in his Petition for Writ of Certiorari that he did draw his weapon. See Anderson's Petition for Writ of Certiorari, p. 8.

was converted into a five day suspension together with an extension of the initial probation period from Anderson's original termination date of November 1996 to February 1997.

The incident on which Anderson's lawsuit is based occurred on March 21, 1997. Anderson was off-duty and was driving a passenger vehicle owned by Irish Dodd who was an occupant. Anderson and the occupants of a Jeep exchanged words and Anderson chased the Jeep for approximately six miles outside of DART's jurisdiction through the Cities of Dallas and University Park.[2] At one point during the six-mile chase, Anderson exited Ms. Dodd's vehicle and drew his DART-issued firearm.[3] Anderson then continued to chase the Jeep until it was pulled over by a University Park police officer. Anderson filed a report on the incident and was placed on administrative leave pending an investigation.

Anderson was terminated based on his involvement in the March 21, 1997 incident. He protested his termination through DART's dispute resolution process. At step three in the process, Anderson presented his case before the Management Appeals Committee ("the Committee"). The three member diversified Committee concluded that Anderson should not be reinstated. Finally, DART's President/ExecutiveDirector, Roger Snoble ("Snoble"),

[2] The characterization as to whether Anderson chased the Jeep or followed it was highly contested. However, the court found it immaterial to its decision.

[3] The issue as to whether Anderson at one point drew his DART issued firearm and moved behind his car or as DART alleged drew his weapon and pointed it at the Jeep's occupants was also a contested issue. However, the court found that Anderson's Response to DART's Motion for Summary Judgment did admit that he drew his weapon.

reviewed the Committee's written recommendation and the documents presented to the Committee, and also denied Anderson's request for reinstatement.

On July 22, 1998, DART filed its Motion for Summary Judgment. DART argued that Anderson had failed to show that DART's proffered reasons for Anderson's termination were a pretext for discrimination under Title VII and that race discrimination was the real reason. Secondly, with respect to Anderson's constitutional claims, DART argued that it was not a person within the meaning of 42 U.S.C. §§ 1983 and 1985 and therefore could not be sued under either provision. Alternatively, DART argued that if the court found that it was a person within the meaning of the statutes, the Eleventh Amendment to the Constitution barred Anderson's claims under Sections 1983 and 1985. Additionally, DART argued that even if Anderson could maintain a § 1983 cause of action against DART, he could not prove that he was discriminated against as a result of DART's official practice, policy or custom or by the actions of a DART official who had "final policy-making authority."

In reference to Anderson's Section 1981 claim, DART argued that it was entitled to summary judgment because the claim was improperly asserted, in that, Section 1983 supersedes claims under Section 1981 since DART was a "state actor."

Finally, with respect to Anderson's retaliation claim under Title VII and his Texas common law claims, DART argued that the undisputed summary judgment evidence established a prima facie showing in DART's favor. Based on Anderson's failure to respond to these claims, DART was entitled to judgment as a matter of law.

Anderson failed to respond to DART's summary judgment motion as to Anderson's claims for retaliation under Title VII, conspiracy under 42 U.S.C. § 1985, and defamation and exemplary damages under Texas common law.

Anderson argued that genuine issues of material fact existed with respect to his disparate treatment claim under Title VII and his claims under 42 U.S.C. §§ 1983 and 1985. In reference to his Title VII claims, Anderson alleged that two Hispanic officers who had been involved in infractions of DART policies and rules had not been terminated. The court found that Anderson's own summary judgment evidence demonstrated material differences between the Hispanic officers' infractions and his own. The court found further that since neither of the Hispanic officers' conduct compromised DART's jurisdictional boundaries nor did either of the Hispanic officers purport to conduct DART business while off-duty, Anderson had failed to establish his prima facie case that Hispanic officers in "nearly identical" circumstances had been treated differently.

Additionally, the court found that Anderson had failed to show that any genuine issue of material fact existed with respect to DART's proffered legitimate reasons for his termination.

Since Anderson failed to respond to DART's Motion For Summary Judgment on Anderson's claim of retaliation under Title VII, the court accepted as undisputed DART's advancement of legitimate, non-discriminatory reasons for his termination. Specifically, the court accepted as undisputed the Recommendations and Findings ("the Findings") of the Committee and the deposition testimony of Snoble. In the report, the Committee found Anderson

violated DART's authority and work rules, both with respect to subject matter jurisdiction and jurisdictional boundaries. Furthermore, in Snoble's deposition he testified that he had reviewed the Findings and documents relied upon by the Committee in arriving at his conclusion and decided not to reinstate Anderson based on his belief that Anderson did in fact, violate DART's work rules.

In reference to his Sections 1983 and 1985 claims, Anderson argued that his termination violated his Fourteenth Amendment Rights. The court concluded that DART was not a person within the meaning of 42 U.S.C. 1983 and 1985. The court further noted that even if DART was found to be a "person" within the meaning of 42 U.S.C. 1983 and 1985, the Eleventh Amendment barred suits in federal court by citizens of a state against their own state or a state agency or department. Furthermore, having found no deprivation of Anderson's constitutional or statutory rights, the court held that no basis existed for assigning liability for a conspiracy. In reference to his section 1981 claim the court held that since Anderson could not bring a Section 1983 claim against DART, his 1981 claim must fail.

Since Anderson failed to respond to DART's Motion For Summary Judgment on his defamation and exemplary damages claim, the court accepted as undisputed DART's argument and authorities that it was immune pursuant to Texas State law from intentional torts and exemplary damages.

On September 29, 1998, the court granted DART's Motion for Summary Judgment. The opinion of the court was published at 1998 W.L.686782 (N.D. Tex 1998).

Anderson timely filed his Notice of Appeal on October 30, 1998. On appeal Anderson asserted eight points of error. However, Anderson's entire eight-point argument is simply that he disagreed with the court's findings of fact, even though the background facts were undisputed except for two immaterial facts to the court's findings of fact and conclusions of law. Anderson merely disputes the District Court's finding that he had not presented a material fact issue regarding discriminatory pretext in his termination; that DART reasonably believed Anderson violated a work rule; and that DART is not a "person" within the meaning of § 1983.

The Fifth Circuit Court concluded that based on their review of the record, the briefs and pursuant to Federal Rule of Civil Procedure 56 they affirmed for essentially the reasons stated by the District Court in its comprehensive and well-reasoned opinion.

The opinion of the Fifth Circuit was not published.

THE STATUTES AND RULES INVOLVED

1. 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity,

injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

2. Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

3. Rule 14. Content of a Petition for a Writ of Certiorari

1. A petition for a writ of certiorari shall contain, in the order indicated:

(a) The questions presented for review, expressed concisely in relation to the circumstances of the case, without unnecessary detail. The questions should be short and should not be argumentative or repetitive. If the petitioner or respondent is under a death sentence that may be affected by the disposition of the petition, the notation "capital case" shall precede the questions presented. The questions shall be set out on the first page following the cover, and no other information may appear on that page. The statement of any question is deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly included therein, will be considered by the Court.

OBJECTION TO QUESTION PRESENTED

Rule 14 of the Supreme Court of the United States. "Content of a Petition for a Writ of Certiorari requires that the questions presented for review be set out on the first page following the cover. Furthermore, only questions set out in the petition, or fairly included therein, will be considered by the court." DART, however, has not been able to find any reference to a question in the event this Court was to grant certiorari. Therefore, DART would object to any question

being presented by Anderson in the event certiorari were to be granted by this Court. Furthermore, since this Court has consistently adhered to Rule 14, allowing Anderson to devise a question for review outside of his Petition for Writ of Certiorari would circumvent the integrity of the certiorari process devised by the Supreme Court. Taylor v. Freeland & Kronz, 503 U.S. 638 (1992); Lake County Estates, Inc., et al. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979).

REASONS WHY THE PETITION FOR CERTIORARI SHOULD BE DENIED

1. Anderson's request for relief meets none of the tests listed in Supreme Court Rule 10: Considerations Governing Review on Certiorari.

Anderson's request for relief does not meet any of the tests listed in Rule 10. The first test as outlined in Rule 10, states that certiorari may be granted if:

> a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same important issue, or has decided a federal question in a manner that conflicts with the decision of the state court of last resort, or has departed so far from the accepted and usual course of judicial proceedings as to call for the exercise of this court's supervisory power.

Anderson has made no claim that a conflict exists between courts of appeals in this case, nor does he claim that the Fifth Circuit decided a federal question in a manner that conflicts with a state court of last resort. Neither does Anderson claim that the Fifth Circuit Court of Appeals has

departed from the accepted and usual course of judicial proceedings in this case. Furthermore, he does not allege that the Fifth Circuit has decided a federal question in a manner that conflicts with an applicable decision of this court. Although, Anderson does allege that the Fifth Circuit has decided an important question of federal law that should be settled by this Court, he makes no reference to a question of federal law that has not been resolved by this Court. Anderson merely asserts that the District Court relied upon DART's versions of the facts rather than his and the District Court erred in finding that the facts he asserted were not material. See Anderson's Petition for Writ of Certiorari, p. 7.

Anderson's reason for granting certiorari is that the lower courts did not agree with his contention that his proffered evidence established a material fact issue regarding discriminatory pretext in his termination, that DART did not reasonably believed he had violated a work rule and that DART was a municipality.

As a general rule, this Court will not grant certiorari to review evidence and discuss specific facts. United States v. Johnson, 268 U.S. 220, 226 (1925); Southern Power Co. v. North Carolina Public Serv. Co., 263 U.S. 508 (1924); General Talking Pictures, Corp. v. Western Elec. Co., 304 U.S. 175, 178 (1938); Texas v. Mead, 465 U.S. 1041 (1984). Moreover, concurrent findings by the two lower courts are not to be disturbed unless plainly without support. General Talking Pictures Corp. v. Western Electric Co.,304 U.S. at 178.

In the case at hand, Anderson is asking this Court to do precisely that. Anderson urges this Court to utilize its discretion in order to reexamine the evidence and decide that he did establish a material fact issue, that DART did not

reasonably believe he had violated a work rule and that DART is a municipality. In essence, Anderson is requesting that this Court disregard the two lower courts' determination as to the specific facts and the sufficiency of the evidence.

As noted earlier, this Court has never considered the review of evidence or inferences drawn from it as constituting a compelling reason to grant certiorari.

2. Anderson's assertions that DART is a municipality subject to 42 U.S.C. § 1983 liability and that DART is not entitled to Eleventh Amendment Immunity do not establish a "compelling reason" for this Court to grant certiorari since the District Court found no deprivation of Anderson's constitutional or statutory rights.

Assuming *arguendo* that DART is subject to Section 1983 liability and is not entitled to Eleventh Amendment immunity, this would still not constitute a "compelling reason" for this Court to grant certiorari. In order to prevail on a Section 1983 claim, Anderson was required to prove that a person acting under color of state law deprived him of a right secured by the Constitution or laws of the United States. Flagg Bros. v. Brooks, 436 U.S. 149, (1978). Since Anderson claimed that his termination violated his Fourteenth Amendment rights, he was required to prove a deprivation of his constitutional or statutory rights. The District Court found no deprivation of Anderson's constitutional or statutory rights. Therefore, no basis exists for assigning 1983 liability.

Thus, even if DART was subject to Section 1983 liability and was not entitled to Eleventh Amendment immunity, in the absence of any deprivation of Anderson's

constitutional or statutory rights, the issue as to whether DART is a "person" subject to 1983 claims or an arm of the state within the meaning of the Eleventh Amendment is immaterial. Having found no deprivation of his constitutional or statutory rights, Anderson could not maintain a Section 1983 claim against DART.

CONCLUSION

Anderson's Petition for Writ of Certiorari presents no compelling reason for this Court to exercise its discretion and review the decision of the Fifth Circuit Court of Appeals on certiorari. Not only does his Petition fail to meet the requirements of Supreme Court Rule 10: Considerations Governing Review on Certiorari, but it would require this Court to disregard its general rule that it does not grant certiorari to review evidence and discuss specific facts absent some extraordinary reason.

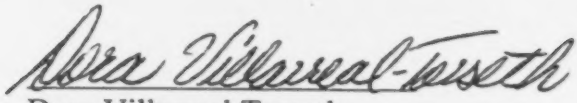
Anderson's entire Petition for Writ of Certiorari merely sets forth his disagreement with the lower court's assessment of the facts he presented. In essence, he argues that this Court should grant certiorari and remand this case for a jury trial because the lower courts disagreed with his assertion that he did present a material fact issue.

The fact that an individual disagrees with the lower court's review of the evidence and/or the inferences drawn from the evidence has never been determined by this Court to constitute a compelling reason to grant certiorari.

For the reasons stated above, DART respectfully requests that this Court deny Anderson's Petition for Writ of Certiorari and all other relief requested.

Dated: November 11, 1999

Respectfully submitted,



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CERTIFICATE OF SERVICE
FOR RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to Supreme Court Rules 29.3 and 29.5, I hereby certifiy that three (3) true and correct copies of Respondent's Brief in Opposition have been served upon all parties required to be served, namely, Petitioner, Pro Se, Mr. Bobbie J. Anderson, 1000 Walnut Street #1045, Dallas, Texas 75243, telephone number 972-690-3154, by sending them certified mail return receipt requested, postage prepaid, on this 11th day of November 1999.

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